DECISION MEMORANDUM REGARDING
ENVIRONMENTAL REVIEW & CATEGORICAL EXCLUSION
NATIONAL ENVIRONMENTAL POLICY ACT (NEPA)

DEPARTMENT OF INTERIOR
NATIONAL PARK SERVICE & UNITED STATES
FISH AND WILDLIFE SERVICE

Firearms Policy Update
36 CFR part 2 and 50 CFR part 27

I. INTRODUCTION

This decision memorandum approves the Department of Interior's use of a NEPA categorical exclusion for the promulgation and implementation of regulations governing the possession and transportation of firearms in national park areas and national wildlife refuges. As described more fully below, the Department has concluded that a NEPA categorical exclusion is appropriate because the final rulemaking is in the nature of a legal change to existing regulations, and that no "extraordinary circumstances" exist which would prevent the proposed action from being classified as categorically excluded.

II. PURPOSE AND NEED FOR THE ACTION

The Department of the Interior, through the National Park Service (NPS) and the United States Fish and Wildlife Service (FWS), is amending regulations presently codified in 36 CFR part 2 and 50 CFR part 27, which provide guidance and controls for the possession and transportation of firearms in national park areas and national wildlife refuges. The amendments would update existing regulations to reflect current state laws authorizing the possession of concealed firearms, while maintaining the existing regulatory provisions that ensure visitor safety and resource protection such as the prohibitions on poaching and limitations on hunting and target practice.

The Department's narrowly tailored amendments to existing regulations do not allow visitors to use firearms in park units or wildlife refuges, nor do the rules authorize visitors to carry a firearm in violation of federal law. Instead, the final rule incorporates state law in the same way that the NPS and the FWS currently follow where hunting, fishing, and boating are allowed. And it makes the policies of the NPS and the FWS more consistent with similar regulations of the United States Forest Service (USFS) and the Bureau of Land Management (BLM), both of which recognize that law abiding citizens may carry concealed firearms under state law. *See* 36 C.F.R. § 261.8 (a)-(c); 43 C.F.R. § 8365.1-7.

III. ANALYSIS OF THE ACTION UNDER NEPA

A. Legal Standards

The National Environmental Policy Act (NEPA) requires federal agencies to document the potential environmental impacts of decisions before they are made, thereby ensuring that environmental issues are considered by the agency and that important information is made available to the larger audience that may help to make the decision or will be affected by it. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To accomplish this objective, NEPA imposes procedural requirements on federal agencies–rather than substantive results–and so long as an agency has taken a "hard look" at the environmental consequences, a reviewing court should not impose its preferred outcome on the agency. *California v. Norton*, 311 F.3d 1162, 1175 (9th Cir. 2002); *Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 546 (11th Cir. 1996).

Regulations adopted by the Council of Environmental Quality (CEQ) at 40 C.F.R. § 1507.3 require Federal agencies to adopt procedures as necessary to supplement CEQ's regulations implementing NEPA and to consult with CEQ during their development and prior to publication in the *Federal Register*. The Department's procedures implementing NEPA as required by CEQ have been contained in chapter 516 of the Departmental Manual (DM). We subsequently revised these procedures and, in October 2008, published the revisions in the *Federal Register* as regulations, which were codified at 43 CFR Part 46. *See* 73 Fed. Reg. 61292 (October 15, 2008).

B. Discussion and Determination

The Department of the Interior has reviewed the above referenced proposed action under the foregoing standards and has determined for the purposes of NEPA that the final rule does not have a significant individual or cumulative effect on the quality of the human environment. Additionally, we have examined possible extraordinary circumstances that would warrant preparation of an environmental assessment (EA) or an environmental impact statement (EIS) and determined that no such circumstances exist. We conclude it is therefore appropriate to apply a categorical exclusion. We discuss each of these points below.

1. Departmental Categorical Exclusion

Section 46.205 of the Department's regulations allows categorical exclusion of actions "which do not individually or cumulatively have a significant effect on the human environment *and* which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations." See 43 CFR § 46.205. For such actions, "neither an environmental assessment nor an environmental impact statement is required." *Id.* As is directly relevant here, § 46.210 of the Department's rule provides in pertinent part:

> "The following actions are categorically excluded under § 46.205(b), unless any of the extraordinary circumstances in § 46.215 apply: .... (i) Policies, directives, regulations, and guidelines: that are of an administrative, financial, legal, technical, or procedural nature; or whose environmental effects are too broad, speculative, or conjectural to lend themselves to meaningful analysis and will later be subject to the NEPA process, either collectively or case-by-case." 43 C.F.R. § 46.210.

The Department's final regulation meets the requirements for the first of the two categorical exclusion options contained in this provision. There are four reasons for this conclusion.

We note at the outset that the final rule is a strictly legal amendment to existing regulations governing firearms in national park units and wildlife refuges. As discussed more fully in the preamble of the final rule, the Department's rulemaking amends existing regulations to allow visitors to carry concealed, loaded, and operable firearms in federal park units and refuges to the extent that they could lawfully do so under non-conflicting state law. By adopting non-conflicting state law in this manner, the Department conforms this rule to an approach similar to that already taken by NPS and FWS in various regulations pertaining to hunting, fishing, motor vehicles and boating. Additionally, the final rule respects state authority in a similar manner to regulations adopted by the Bureau of Land Management (BLM) and the United States Forest Service (USFS), both of which allow visitors to carry weapons consistent with applicable federal and state laws. *See* 36 C.F.R. § 261.8 (a)-(c); 43 C.F.R. § 8365.1-7. Since the rule adopts this approach and constitutes a regulation of a legal nature, we have determined that it should be excluded from further review under NEPA.[1]

Second, the Department has concluded that the final rule will not have any actual effects on the environment. As stated above, the rule is a strictly legal amendment to existing regulations and does nothing more than incorporate state law with respect to concealed firearms. Moreover, the amendment does not allow visitors to fire or discharge the firearms in any way, brandish the weapon in the view of others, or use the firearm in any other way. In this regard, the final rule does not authorize any *actual* impacts on the environment, and thus meets the test for a categorical exclusion under relevant regulations and judicial precedent. See *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir.2007) (categorical exclusion inappropriate for USFS "fuel reduction projects" up to 1000 acres involving prescribed burns); *California v. Norton*, 311 F.3d 1162, 1172 (9th Cir.2002) (categorical exclusion inappropriate for extension of offshore drilling leases which required drilling and seismic testing with underwater explosives).

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[1] The BLM reached the same basic conclusion in 1982 when it proposed its rule at 43 C.F.R. § 8365.1, which incorporates state and local law concerning the use of firearms on lands managed by the BLM. See 48 Fed. Reg. 36382, 36384, August 10, 1983 ("It is hereby determined that the publication of this final rulemaking is not a major Federal action significantly affecting the quality of the human environment, and that a detailed statement pursuant to section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) is not required.")

Finally, we note that the BLM and the U.S. Forest Service currently authorize the possession of concealed firearms consistent with the laws of the state in which they are located. The available data does not suggest that visitors to these lands use legally permitted firearms for poaching or illegal shooting, or that there is additional danger posed to the public from lawfully carried concealed firearms. See, e.g., National Research Council, Committee on Law and Justice, *Firearms and Violence: A Critical Review* (Washington, D.C.: The National Academies Press, 2004), p.6. In fact, a number of academic studies and surveys demonstrate that individuals authorized to carry concealed firearms are *less likely* than the general public to commit a violent crime or engage in a personal confrontation with a firearm. See, e.g., See Lott, John Jr., *The Bias Against Guns: Why Almost Everything You've Heard About Gun Control is Wrong* (2003); Lott, John Jr., *More Guns, Less Crime* (University of Chicago Press, 2000); Dodenhoff, David, *Concealed Carry Legislation: An Examination of the Facts*, Wisconsin Public Policy Research Institute (2006), p. 5; *see also*, Jeffrey Snyder, *Fighting Back: Crime, Self-Defense, and the Right to Carry a Handgun* (October 1997); Kopel, David, et al., *Policy Review* No. 78 (July & August 1996). Moreover, the final rule explicitly maintains existing prohibitions on poaching, target shooting, and other illegal uses of firearms, including laws against brandishing a firearm in public. *See* 18 U.S.C. § 924. As with any other law or regulation, the Department expects visitors to obey those requirements.

2. Extraordinary Circumstances

Section 46.215 provides that the Department's Responsible Official must determine if any "extraordinary circumstances" exist which would prevent the proposed action from being classified as categorically excluded. As required by the regulations, we have conducted that inquiry by analyzing whether the proposed action meets any of the following criteria and have concluded it does not, so application of a categorical exclusion is appropriate. Here are the criteria and our responses:

(a) Have significant impacts on public health or safety?

No. The final rule does not allow visitors to *use or discharge* firearms in park units or wildlife refuges, nor does it authorize visitors to *carry or brandish* a firearm in violation of state or federal law. As stated above, the final rule explicitly maintains existing prohibitions on poaching, target shooting, and other illegal uses of firearms, including laws against brandishing a firearm in public. *See* 18 U.S.C. § 924. As with any other law or regulation, the Department expects visitors to obey those requirements.

(b) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks; sole or principal drinking water aquifers; prime farmlands; wetlands (E.O. 11990); floodplains (E.O. 11988); national monuments; migratory birds; and other ecologically significant or critical areas?

No. The Department has concluded that the final rule will not have any actual effects on the environment. First, as stated above, the rule is a strictly legal amendment to existing

regulations and does nothing more than incorporate state law with respect to concealed firearms. And second, the amendment does not allow people to fire or discharge the firearms in any way, brandish the weapon in the view of others, or use the firearm in any other way.

(c) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources [NEPA section 102(2)(E)]?

No. We note that a number of courts have decided that federal agencies are precluded from relying on a categorical exclusion where the proposed action had some actual extractive or resource impact that might result in some measurable effect on the environment. The Department's action lacks that important factor. Our amendments to existing regulations have absolutely no actual, extractive impact to the environment. The regulations simply allow an individual to carry or possess an operable and concealed firearm as authorized by state law. The provisions do not allow visitors to fire or discharge the firearms in any way, brandish the weapon in the view of others, or use the firearm in any other way.

We have determined that there is no high degree of controversy on environmental grounds because there is no substantial dispute as to the size, nature, or effect of the proposed Federal action. We have received letters expressing opposition to implementation of the proposed action. However, based upon our analysis of these concerns, and consultation with the CEQ and the Department's Office of Environmental Policy and Compliance, neither the presence of speculative risks of harm nor the expression of comments both pro and con qualify as "controversy on environmental grounds" within the meaning of CEQ regulations. For a proposed action to qualify as highly controversial on environmental grounds, it would mean that reasonable disagreement exists over the risk of the action causing environmental harm. That requirement has not been met here.

(d) Have highly uncertain and potentially significant environmental effects or involve unique or unknown environmental risks?

No. We note that a number of commenters suggest that the final rule meets this criteria because there is a chance that individuals will use their concealed handgun in violation of the law, thereby causing negative and potentially lethal consequences. Although this may be a hypothetical possibility, we are aware of no evidence showing that an individual with a concealed carry permit has misused a firearm on federal land, or that there is additional danger posed to the public from lawfully carried concealed firearms. See, e.g., National Research Council, Committee on Law and Justice, *Firearms and Violence: A Critical Review* (Washington, D.C.: The National Academies Press, 2004), p.6.

We have noted above that there is a fundamental difference between a speculative probability of possible harm and an actual impact to the environment which may recur or increase. As some courts have suggested, there may be good reasons to require analysis of a federal action that involves some actual impact to the environment, e.g., prescribed burns of forest lands or underwater seismic testing using explosives. However, we do not

believe it is reasonable or helpful to analyze whether a hypothetical possibility (use of a weapon) will possibly lead to some form of impact to the environment (bullets discharged into a tree or visitor's center). If that were the rule, the Department would be required to prepare an EA on an NPS rule allowing visitors to carry an emergency flare gun simply because a visitor might use the flare for frivolous or illegal purposes. We do not believe such an approach is consistent with the objectives of NEPA, and will not adopt that reasoning here.

(e) Establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects?

No.

(f) Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects?

No.

(g) Have significant impacts on properties listed, or eligible for listing, on the National Register of Historic Places?

No.

(h) Have significant impacts on species listed, or proposed to be listed, on the List of Endangered or Threatened Species, or have significant impacts on designated Critical Habitat for these species?

No. The final rule is solely a legal amendment to existing rules and does not authorize any new uses or activities that will affect endangered or threatened species. See, 50 C.F.R. §§ 402.02; § 402.14(a). For this reason, we have determined that the final rule has "no effect" on listed species or on designated critical habitat.

(i) Violate a Federal law, or a State, local, or tribal law or requirement imposed for the protection of the environment?

No. The rule is strictly a legal amendment or change to existing regulations and does nothing more than incorporate state law with respect to concealed firearms. The amendment does not allow visitors to fire or discharge the firearms in any way, brandish the weapon in the view of others, or use the firearm in any other way. In this regard, the final rule will not have any actual effects on the environment.

(j) Have a disproportionately high and adverse effect on low income or minority populations (E.O. 12898)?

No.

(k) Limit access to and ceremonial use of Indian sacred sites on Federal lands by Indian religious practitioners or significantly adversely affect the physical integrity of such sacred sites (E.O. 13007)?

No.

(l) Contribute to the introduction, continued existence, or spread of noxious weeds or non-native invasive species known to occur in the area or actions that may promote the introduction, growth, or expansion of the range of such species (Federal Noxious Weed Control Act and E.O.13112)?

No.

IV. SCOPING AND PUBLIC COMMENT

The Department is not required by law to solicit general public comment on Federal actions that meet the requirements for categorical exclusion under NEPA. However, we understand that one or more courts have suggested that a federal agency is required to conduct a public "scoping process" before rendering a final decision on a categorical exclusion (CE), and that an agency may fulfill this responsibility by notifying those who may be affected by the proposal that the agency is beginning to consider the impacts of the proposed action. See *Kootenai Tribe v. Veneman*, 313 F.3d 1094, 1116-1117 (9th Cir. 2002) (noting that the affirmative duties NEPA imposes on a government agency during the scoping process are limited); cf. *Alaska Center for the Environment v. United States Forest Service*, 189 F.3d 851, 859 (9th Cir. 1999) (in determining the propriety of the CE, the agency must use the "scoping process" to "determine the scope of the issues to be addressed and for identifying the significant issues related to the proposed action).

The Department has conducted a scoping process in this rulemaking that involved two interrelated steps. First, our notice of proposed rulemaking explicitly informed the public that the Department would consider the potential impacts of the decision on the environment as required by NEPA. See 73 Fed. Reg. 23388 (April 30, 2008). Second, we provided further scoping of public views by carefully analyzing comments on the proposed rule concerning the potential impacts of the rule on the environment, as well as the proper extent of environmental review under NEPA, including the use of a categorical exclusion. We then prepared written responses to those comments and included the responses in the final rule.

There are two general comments that warrant some discussion here, and we will address each in turn.

The first issue pertains to the Department's reliance on the categorical exclusion in regulations set forth in 43 CFR Part 46. See 73 Fed. Reg. 61292 (October 15, 2008). On November 7, 2008, two groups submitted a joint letter to the Department asserting that it is inappropriate to cite and discuss this newly-promulgated regulation because the provision was not in effect when the Department first published its proposed rulemaking

regarding firearms on lands managed by the NPS and the FWS. See Letter to the Honorable Lyle Laverty, Assistant Secretary for Fish and Wildlife and Parks, dated November 7, 2008, from the Coalition of National Park Service Retirees and the National Parks Conservation Association. We disagree with this assertion. At the time the Department issued the proposed rule, we considered the potential effects of the action on the environment under provisions set forth in the DOI Department Manual ("DM"), which the Department subsequently re-instituted as a regulation at 43 CFR Part 46. See 73 Fed. Reg. 61292 (October 15, 2008). The Department's newly published provision governing categorical exclusions contained a minor editorial correction of the prior DM provision which it described as an "unintended drafting error," and thus did not require any change in our analysis of this action under NEPA. *See* 73 Fed. Reg. 61292, 61304 ("With the correction effectuated by this 2008 rulemaking ... this CE has now been replaced with its original version. As such, actions such as procedural rules with no individual or cumulative significant environmental effects are covered by the categorical exclusion ..."). For this reason, we correctly applied that standard to this rulemaking.

A second set of comments suggested that the Department should conduct a more extensive environmental analysis of the regulation to address the *possibility* that individuals will draw their concealed handgun, pull the trigger, and discharge a round into the environment, thereby causing negative and potentially lethal consequences. One organization has recently attempted to validate concerns of this nature with a "survey" of some 1400 present and former NPS and FWS employees which purports to show that the regulation will result in an environmental impact. See *Natural and Cultural Resource Impacts and Management Consequences of the Proposed Regulation to Authorize the Possession of Concealed Firearms in Units of the National Park & National Wildlife Refuge System*, Coalition of National Park Service Retirees (CNPSR) (October 8, 2008) (employees "predict" that the proposed rule governing firearms in park units and wildlife refuges "will have an adverse affect on the ability of NPS and USFWS employees to accomplish their mission").

The Department reviewed this survey and does not believe that it outweighs the available data and studies we have cited above. Unlike the literature we have reviewed, the survey and analysis relies entirely on the personal opinions of concerned individuals. The CNPSR survey does not attempt to substantiate the stated opinions with any statistical or scientific data which would suggest that individuals authorized to carry concealed firearms are actually likely to use their firearms and injure the environment. In the absence of such evidence, CNPSR is asking the Department to assume, without warrant, that people who carry concealed firearms authorized by state law will not obey applicable requirements, including limits on use and on brandishing weapons in public.

We do not believe this is a legitimate assumption. In our view, there is a fundamental difference between a speculative probability of possible harm and an actual impact to the environment which may recur or increase. There may be good reasons to require analysis of a federal action that involves some actual impact to the environment, e.g., prescribed burns of forest lands or underwater seismic testing using explosives. See *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir.2007) (categorical exclusion inappropriate for USFS "fuel reduction projects" up to 1000 acres involving prescribed burns); *California v.*

Norton, 311 F3d 1162, 1172 (9th Cir.2002) (categorical exclusion inappropriate for extension of offshore drilling leases which required drilling and seismic testing with underwater explosives). But in this action, we do not believe it is reasonable or helpful to analyze whether a hypothetical possibility (use of a weapon) will possibly lead to some form of impact to the environment (bullets discharged into a tree or visitor's center). If that were the rule, the Department would be required to prepare an EA on an NPS rule allowing visitors to carry an emergency flare gun simply because a visitor might use the flare for frivolous or illegal purposes.

We do not believe such an approach is consistent with the objectives of NEPA, and will not adopt that reasoning here. For the reasons stated above, the Department believes the more reasonable conclusion is to recognize, as we do here, that pursuant to our NEPA regulations, our amendment to existing firearms regulations is not an action requiring an environmental assessment or an environmental impact statement because the rule is simply a legal change, and that the action will not have any actual effects on the environment.

V. DECISION AND ORDER

The Department of the Interior has reviewed the above referenced proposed action and determined that it will not have a significant individual or cumulative effect on the quality of the human environment and we have examined possible extraordinary circumstances that would warrant preparation of an EA or EIS and determined that no such circumstances exist.

Having carefully considered environmental benefits and the operational impacts of this action, as the Responsible Official, I find that the action is reasonably supported and that no extraordinary circumstances apply according to 43 CFR § 46.215, therefore the final rule is categorically excluded from further environmental documentation under NEPA according to 43 CFR § 46.210.

November 18, 2008

Lyle Laverty

Lyle Laverty
Assistant Secretary for Fish and Wildlife and Parks